82-5768

Office - Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

NO. 82-

EDWIN RIVERA,

Petitioner,

-against-

PHILIP COOMBE, JR., Superintendent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM E. HELLERSTEIN
Attorney for Petitioner
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420

SUSAN HOFKIN SALOMON
HOWARD COMET
Of Counsel

QUESTION PRESENTED

Whether the "charge as a whole" analysis of the Court of Appeals for the Second Circuit, which upheld the jury instruction that "a man is presumed to intend the natural and probable consequences of his act," conflicts with the analysis in Sandstrom v. Montana, 442 U.S. 510 (1979), which held such a charge violative of due process.

TABLE OF CONTENTS

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 9

CONCLUSION. 17

APPENDICES

APPENDIX A. (Opinion of the Court of Appeals for the Second Circuit). A-1

APPENDIX B. (Opinion of the District Court). B-1

TABLE OF AUTHORITIES

CASES:

Arroyo v. Jones, 685 F.2d 35 (2nd Cir. 1982), petition for cert. filed, Sept. 21, 1982 (No. 82-521) 16

Cool v. United States, 409 U.S. 100 (1972). . . 6

Cupp v. Naughten, 414 U.S. 141 (1973) 6, 7, 9, 12, 13, 14, 15, 16, 17

Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981). . 16

Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981). 16, 17

Henderson v. Kibbe, 431 U.S. 145 (1977) 6, 13, 16

Langone v. Smith, 682 F.2d 287 (2nd Cir. 1982) (Oakes, C.J., dissenting from denial of rehearing en banc) 15

Leary v. United States, 395 U.S. 6 (1969) 6, 10

Mancuso v. Harris, 677 F.2d 206 (2nd Cir. 1982), petition for cert. filed, Aug. 16, 1982 (No. 82-5239) 14

Nelson v. Scully, 672 F.2d 266 (2nd Cir. 1982), cert. denied, 50 U.S.L.W. 3948 (June 1, 1982) 8, 12, 13, 14

Ramirez v. Jones, 683 F.2d 712 (2nd Cir. 1982), petition for cert. filed, Oct. 1, 1982 (No. 82-504) 16

Sandstrom v. Montana, 442 U.S. 510 (1979) . . . 5-17

State v. Johnson, 440 A.2d 858 (Conn. 1981), cert. granted sub nom. Connecticut v. Johnson, 50 U.S.L.W. 3648 (Feb. 22, 1982) (No. 81-927) 13

CONSTITUTIONAL PROVISION:

United States Constitution, Amendment XIV 5, 6, 10

STATUTORY PROVISIONS:

N.Y. Crim. Proc. Law §440.10 5

N.Y. Penal Law §120.15 2

§120.20 2

§120.25 3

§125.10 2

§125.15(1) 2

§125.20(1) 2, 7, 11

§125.25(1) 1, 7

OPINIONS BELOW

The opinion of the court of appeals is reported at 683 F.2d 697. It is reproduced below as Appendix A. The opinion of the district court is reported at 534 F.Supp. 980. It is reproduced below as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1982. A timely petition for rehearing was filed and was denied on August 23, 1982.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV.

STATEMENT OF THE CASE

Petitioner, Edwin Rivera, was indicted in the New York Supreme Court, Bronx County, for murder in the second degree[1] and for a misdemeanor charge of possession of a weapon.[2] It was alleged that petitioner, then a teenage youth with no prior convictions, had intentionally stabbed Guy Keyes to death.

The Trial

On the evening of February 28, 1974, Keyes, a six-foot tall, twenty-two year-old black man, accosted Rosario Castro in a drunken manner, demanding cigarettes and money. Petitioner, sixteen years old and slightly over five feet tall, interceded on Ms. Castro's behalf, escorting her to her grandmother's store, the Aida

---

1 Murder in the second degree is defined, in relevant part, in N.Y. Penal Law §125.25(1):

> A person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person. . . .

2 The misdemeanor charge is not at issue in this habeas proceeding.

Superette.

About ten minutes later, Keyes entered the store, accompanied by two tall black men. Keyes declared that he was "looking for trouble." After Ms. Castro and her grandmother managed to get Keyes outside, Ms. Castro's brother, John Velez, came to their aid.

A crowd gathered outside the store, and some members of the crowd, including petitioner, chased Keyes away. Several minutes later, petitioner returned to the store, holding a knife. He told Velez and Jose Mendez, "I think I stabbed him [Keyes] in the back."

The medical examiner, Dr. Dominick DiMaio, testified that Keyes died from a single stab wound, four to five inches deep.

Petitioner testified in his own behalf, and admitted helping Ms. Castro when Keyes first bothered her, as well as joining in the group that chased Keyes away from the store. But he denied any intent to harm Keyes, denied stabbing him, and denied possessing a knife or making a statement about the stabbing.

In its charge, the court instructed the jury both on murder in the second degree and the lesser included offense of manslaughter in the first degree.[3] Defense counsel also requested instructions on the lesser crimes of manslaughter in the second degree (N.Y. Penal Law §125.15(1); recklessly causes death), criminally negligent homicide (N.Y. Penal Law §125.10), menacing (N.Y. Penal Law §120.15), and reckless endangerment in the first and second degrees (N.Y. Penal Law §§120.20,

---

[3] Manslaughter in the first degree is defined, in relevant part, in N.Y. Penal Law §125.20(1):

> A person is guilty of manslaughter in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person. . . .

120.25). With regard to all of these crimes, counsel argued that the sparse evidence concerning petitioner's mental state raised the possibility of a lesser degree of culpability. Although the prosecutor consented to the requests for second degree manslaughter and criminally negligent homicide, the court denied all of the further requests.

During its charge, the court instructed the jury on intent, as follows:

> I shall now define intent for you. A person is presumed to intend the natural and probable consequences of his act. Criminal intent is an intent do do knowingly and wilfully that which is condemned as wrong by the law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof. To constitute the crime there must not only be the act but also the criminal intent and these must occur, the latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for determination by you and the burden of showing intent, the intent with which a crime has been committed rests upon the prosecution to establish it by evidence beyond a reasonable doubt. So where the law requires that the People must establish a specific or certain intent on the part of one charged with the commission of a crime, the law does not expect or require for obvious reasons that intent must be proved by direct proof to an absolute certainty or with mathematical precision. Intent, I mean criminal intent, is always an essential element of the commission of the crime such as we have here and it may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or the act itself, or it may be proved by a combination of both. What is intent? Intent is a frame of mind of the perpetrator of the act at the time he commits it. You must probe the mind. You may say to yourself how are we to determine what a man's intentions are. Well members of the jury, we can only determine that by his acts, by his conduct, by what he says and by what he does. You should consider what he allegedly did, what means he al-

legedly employed, the type of instrument allegedly used, if any, the part of the body allegedly attacked, and all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time.

Under our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result. The intent formed, is a secret and silent operation of the mind and its physical manifestations, the accomplishment of the thing determined upon. The individual whose intent is sought to be ascertained may remain silent or if he speaks, may probably will if he has a crime to hide, speak untruthfully, and thus the mind is compelled from necessity to refer to the act and the physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained [emphasis added].

Regarding the murder count, the court charged that the prosecution had to prove intent to kill. And in defining first-degree manslaughter, the court stated that the "only" intent the prosecution had to prove was intent to cause serious physical injury. General instructions on reasonable doubt and the presumption of innocence included statements that the burden of proof rested with the prosecution.

The jury acquitted petitioner of murder, but found him guilty of manslaughter in the first degree and misdemeanor possession of a weapon.

Sentencing

On September 12, 1975, petitioner was sentenced to a term of imprisonment of seven to twenty-one years for the manslaughter conviction and to an unconditional discharge for the misdemeanor conviction.

The State Appeals

On October 3, 1977, petitioner's convictions were affirmed without opinion by the Supreme Court of the State of New York, Appellate Division, First Department. People v. Rivera, 59 A.D.2d 829, 398 N.Y.S.2d 351. The New York Court of Appeals denied petitioner leave to appeal to that court on November 21, 1977. People v. Rivera, 43 N.Y.2d 799, 402 N.Y.S.2d 1037. Subsequently, pursuant to N.Y. Crim. Proc. Law §440.10, petitioner filed a motion with the judge who presided at his trial, seeking to vacate the first degree manslaughter conviction on the ground that, under Sandstrom v. Montana, 442 U.S. 510 (1979), the judge's "natural consequences" intent instructions violated his Fourteenth Amendment right to due process.

On November 28, 1979, the judge denied the motion, on the merits. He found that homicidal intent was not at issue since, at trial, petitioner denied committing the stabbing. The judge also determined that, in any event, the challenged instruction was not error because the jury was given the choice whether to employ the "natural consequences" presumption. On February 5, 1980, the Appellate Division denied leave to appeal the judge's decision.

Federal Habeas Corpus Proceedings

On December 31, 1980, petitioner sought a writ of habeas corpus (28 U.S.C. §2254) in the United States District Court for the Southern District of New York, again asserting the unconstitutionality of the "natural consequences" intent instructions. The Hon. Robert Ward granted the writ on February 11, 1982. 534 F.Supp. 980. Appendix B.

After noting that petitioner exhausted his state remedies (Appendix B, at 5-6), the District Court turned to the merits. In finding the intent instructions violative of due process, Judge Ward first summarized Sandstrom's teachings concerning the unconstitutionality of instructions which can be understood as mandatory, conclusive or burden-shifting presumptions on intent. Appendix B, at 6-8. Under Sandstrom, the District Court continued,

> [a] charge susceptible of such an interpretation by a reasonable jury so infects the trial of which it is a part that a conviction rendered subsequent to the charge cannot withstand due process attack, see Cupp v. Naughten, 414 U.S. 141, 147 (1973), even if the charge was also capable of being understood by a reasonable jury in a manner that comports with the Constitution, see Leary v. United States, supra note 2, 395 U.S. at 31-32. Judgments of conviction must occasionally be vacated or reversed on this theory where the charge contained only one erroneous instruction. See, e.g., Cool v. United States, 409 U.S. 100, 102-03 (1972). However, a judgment of conviction will not be rendered constitutionally infirm by one deficient instruction if the charge, when considered as a whole, clearly informs the jury of the correct legal principle. Henderson v. Kibbe, 431 U.S. 145, 153 (1977); see Cupp v. Naughten, supra, 414 U.S. at 147.

Appendix B, at 8-9.

Applying these principles to petitioner's case, the District Court found that the trial court's twice repeated instruction -- "[a] person is presumed to intend the natural and probable consequences of his act" -- violated Sandstrom. Appendix B, at 9. As the District Court reasoned: "once the jury found that serious physical injury to Guy Keyes was a natural and probable consequence of an act performed by Rivera, the jury was then

required to find that Rivera had the requisite intent to cause Guy Keyes serious physical injury. Thus, [these instructions]. . . reasonably could have been understood by the jury to describe a constitutionally impermissible conclusive mandatory presumption."[4] Appendix B, at 9. There were, the District Court observed, other portions of the intent charge which described a permissive inference as to intent, namely those stating that the jury had "the right" to "infer" intent from the facts and "circumstances" in the case. Appendix B, at 10. But these instructions merely provided the jury with a constitutional "alternative" to the unconstitutional presumption, an "alternative" which the District Court could not be certain the jury employed. Appendix B, at 10. As Sandstrom's own analysis established, 442 U.S. at 525-26, because of such uncertainty, a "charge as a whole" (Cupp v. Naughten, supra, 414 U.S. 141) analysis could not save the defective intent instructions. Appendix B, at 8-9. Finally, the District Court concluded that the unconstitutional instructions could not be deemed harmless beyond a reasonable doubt, noting, inter alia, that petitioner's intent was contested. Appendix B, at 18.

By a two to one vote, a panel of the Court of Appeals for the Second Circuit reversed Judge Ward's order. 683 F.2d 697 (1982). Appendix A. "[V]iewing the charge as a whole," the majority (Lumbard and Moore, C.J.J.) found that the jury was told "to weigh all the circumstances in determining whether Rivera had the requisite

---

4 As noted ante, at pp. 1 and 2, the requisite intent for second degree murder under N.Y. Penal Law §125.25(1) is the intent to cause death; for first degree manslaughter under N.Y Penal Law §125.20(1) (of which petitioner was convicted), it is the intent to cause serious physical injury.

intent and that it was entitled to infer intent from his acts." Appendix A, at 4. Specifically, the Court of Appeals acknowledged that the "natural consequences" instruction "could be construed as mandatory" (Appendix A, at 5); and it apparently conceded impropriety in the trial court's closing words on intent, which were: "thus the mind is compelled from necessity to refer to the act and physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained." Appendix A, at 5-6. But, the majority maintained, the trial court's "right to infer" and "circumstances" language overcame the objectionable instructions.[5] Appendix A, at 5. In the majority's opinion, petitioner's conviction for first degree manslaughter was the "best [he] could expect," and it also established that his jury did not rely on the challenged instructions. Appendix A, at 6.

The dissenter (Oakes, C.J.) observed that, by using the "debatable" "charge as a whole" analysis of Nelson v. Scully, supra, 672 F.2d 266, the majority had done nothing less than "scuttle the Court's unanimous decision" in Sandstrom. Appendix A, at 6, 7. Reprising Judge Ward's opinion, the dissent emphasized that because the trial court "hammered in both permissive and mandatory concepts," there was no assurance that the jury did not rely on the mandatory ones. And it was just such a lack of assurance, as Sandstrom instructed, 442 U.S. at 519, which rendered unconstitutional the instructions challenged in petitioner's case. Appendix A, at 7-8.

---

5 In support of its conclusion, the majority cited the holding of Nelson v. Scully, 672 F.2d 266 (2nd Cir. 1982), cert. denied, 50 U.S.L.W. 3948 (June 1, 1982), which found no constitutional error in a "natural consequences" intent instruction. Appendix A, at 5.

On August 23, 1982, the Second Circuit denied petitioner's request for rehearing, Judge Oakes dissenting. With respect to petitioner's concomitant suggestion for rehearing en banc, the Circuit's order noted that no member of the court had requested that a vote be taken.

REASONS FOR GRANTING THE WRIT

At his trial for second degree (intentional) murder, petitioner's jurors were twice instructed, as to the intent element of the crime, that "a person is presumed to intend the natural and probable consequences of his act." These instructions were essentially a verbatim recitation of the instruction condemned in Sandstrom v. Montana, 442 U.S. 510 (1979). Nevertheless, viewing the trial court's "charge as a whole," the majority of the Court of Appeals for the Second Circuit concluded that the jury was told merely "to infer intent from [petitioner's] acts," and that the intent charge was thus constitutional. Appendix A, at 4. The Second Circuit has employed this "charge as a whole" test, to excuse language which plainly runs afoul of Sandstrom, in virtually every Sandstrom - based case which has come before it on habeas corpus review of a state conviction. The Seventh Circuit has also used the analysis in the same fashion, but the Eighth Circuit has not. Because this analysis, purportedly based on Cupp v. Naughten, 414 U.S. 141 (1973), conflicts with the analysis set forth in Sandstrom, and because the "charge as a whole" analysis is itself in dispute, petitioner's case merits this Court's review.

As this Court emphasized repeatedly in Sandstrom, its touchstone was "the way in which a reasonable juror could have interpreted the instruction." 442 U.S. at 514. Accordingly, the Court did not "reject" the "possi-

bility" that Sandstrom's jurors could have understood the "ordinary consequences" intent charge as describing a permissive inference. But because it also could not "discount" the "possibility" that the jurors apprehended the instruction as a mandatory, conclusive or burden-shifting presumption, the Court held the instruction violative of due process. Id. at 510. In the same vein, the Court rejected the state's argument that the jurors may have convicted Sandstrom on the basis of "knowlege" as the mental state and therefore did not rely on the unconstitutional instruction, which was relevant only as to "purpose" as a mental state. Id. at 525. First, the Court countered by suggesting that the jury probably considered only "purpose," because the unconstitutional presumption made that an easier task than evaluating "knowlege." Id. at 526 n. 13. In any event, the state's argument was untenable because the Court could not be certain about the jury's deliberative process. Id. at 526. Quoting from Leary v. United States, 395 U.S. 6, 31-32 (1969), the Sandstrom Court thus concluded: "'[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.'" 442 U.S. at 526.

In petitioner's case, the District Court applied precisely this "reasonable juror" - "possibility" analysis in finding the intent instructions violative of due process. As the dissent below suggested, had the Court of Appeals majority likewise applied it, the District Court's granting of habeas corpus relief would have been affirmed. To be sure, petitioner's jurors were twice told that they had "the right" to "infer" intent from all the "circumstances" in the case, and they were also told that intent was a "question of fact" to be determined by

them and proved by the prosecution beyond a reasonable doubt. But, these permissive instructions aside, they were also twice charged the bald, and impermissible, "natural consequences" presumption. Furthermore, at the conclusion of the intent instructions, they were told that "the act and the physical manifestations of the intent exhibited by the results produced [are] the safest if not the only proof of the fact to be ascertained" -- words which powerfully restated the presumption. Given these disparate instructions, the possibility cannot be discounted that a reasonable juror applied the unconstitutional ones. Indeed, the possibility is substantial, for employing the presumption would have been easier than evaluating the circumstances and drawing inferences. Cf. Sandstrom v. Montana, supra, 442 U.S. at 526 n. 13.

But the majority eschewed this analysis. Instead, it perfunctorily noted that the trial court's recital of the "natural consequences" presumption "could be construed as mandatory," and it merely recognized that the final "results produced" language was improper. Appendix A, at 5, 6. These unconstitutional instructions thus summarily dispensed with, the majority recited the permissive ones. Never acknowledging the possibility that the jurors could have seized on the defective instructions, the court concluded that the "charge as a whole" was proper.[6]

---

[6] To support its conclusion, the majority noted that petitioner was acquitted of second degree murder and convicted of only first degree manslaughter [N.Y. Penal Law §125.20(1); with intent to cause serious physical injury, causes death]. According to the majority, the "natural consequence" of petitioner's alleged act -- inflicting a 5" stab wound in the deceased's back -- was death. From this, the court reasoned that petitioner's acquittal of intentional murder meant that the jury disregarded the impermissible presumption instructions. Appendix A, at 6. The court's reasoning, however, further demonstrates

(Footnote Continued)

As the majority intimated (Appendix A, at 5), and the dissent made clear (Appendix A, at 6-8), the source of the majority's "charge as a whole" analysis was Nelson v. Scully, 672 F.2d 266 (2nd Cir. 1982), cert. denied, 50 U.S.L.W. 3948 (June 1, 1982), which also involved a state prisoner's collateral attack on a conviction because of an alleged Sandstrom violation. Nelson itself, 672 F.2d at 268, 271-72, relied on Cupp v. Naughten, supra, 414 U.S. 141, as mandating such a test. There, this Court stated:

> [A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . [T]he question is not whether the

(Footnote Continued)

its disregard of Sandstrom's "reasonable juror" - "possibility" analysis. A reasonable juror may well have concluded that a "natural consequence" of petitioner's act was the causing of serious physical injury, and that the deceased's death was an unexpected result. The presumption therefore may have been used to reach the first degree (intentional) manslaughter conviction.

Nor, contrary to the majority's implicit harmless error analysis, was a first degree manslaughter conviction "the best [petitioner] could expect once the jury found that he had in fact stabbed Keyes in the back." Appendix A, at 6. The evidence of petitioner's intent was far from overwhelming. The state's witnesses placed petitioner as Ms. Castro's protector when the drunk Keyes bothered her, in the crowd outside the Aida Superette when the bullying Keyes arrived looking for "trouble," and in the group chasing Keyes away. In his testimony, petitioner admitted as much. But the only direct evidence about the stabbing -- petitioner's statement in the store, "I think I stabbed him in the back" -- far from proving specific intent, indicated petitioner's incredulity at what had occurred and even unawareness of the stabbing until it was over. Indeed, because the stabbing occurred during a chase, it is as likely that Keyes came in contact with the knife by stopping suddenly and causing petitioner to collide with him, or that petitioner tripped, stumbled or fell into Keyes. The medical evidence was equally consistent with any of these interpretations, all of which suggested the absence of intent to cause serious physical injury. That the trial prosecutor thought intent was seriously at issue was demonstrated by his consent to defense counsel's request to charge second degree (reckless) manslaughter and criminally negligent homicide.

(Footnote Continued)

> trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

Id. at 146-47. Accord, Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (noting that the "overall charge" analysis is particularly applicable upon federal review of a collateral attack on a state court judgment). Significantly, however, this analysis was used in Cupp to determine whether the instruction at issue there -- "every witness is presumed to speak the truth" -- was constitutional error in the first place. This Court determined that, standing alone, it was not: "Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence. . . ." Cupp v. Naughten, supra, 414 U.S. at 148. The Court then went on to observe that the other instructions -- including those as to the presumption of innocence, and that the jury should consider each witness's demeanor, possible motive to lie, and whether he was otherwise impeached -- conclusively negated any conceivable "theoretical" harm caused by the challenged instruction. Id. at 149.

Beginning with Nelson v. Scully, supra, 672 F.2d 266, the Second Circuit has purportedly applied Cupp's "charge as a whole" test in reviewing the Sandstrom challenges of state prisoners. But the Circuit had interpreted Cupp in a sweeping, and apparently erroneous, manner, using Cupp's analysis to uphold instructions which, under Sandstrom, are constitutional error in the

(Footnote Continued)

We would also note that the question whether Sandstrom error is even susceptible of harmless error analysis is pending before the Court. State v. Johnson, 440 A.2d 858 (Conn. 1981), cert. granted sub nom. Connecticut v. Johnson, 50 U.S.L.W. 3648 (Feb. 22, 1982) (No. 81-927).

first place, and using it in derogation of Sandstrom's own analysis. For example, in Nelson, the court was confronted with a charge arguably more offensive than the one delivered in Sandstrom:

> Also, there is a principal [sic] of law upon which you may wish to rely in determining a person's intent, and that is, a person is presumed to intend the natural and probable consequences of his acts. A person cannot, for example, throw someone off the roof of an apartment building and then say he was merely conducting an experiment in aerial dynamics.

672 F.2d at 268. Ignoring Sandstrom's "reasonable juror" -- "possibility" test, the Nelson majority excused the charge:

> To be sure, a trained lawyer possessing the analytical skill of our dissenting brother could parse the instruction as saying that the jury was free to rely or not to rely on the principle of law mentioned by the judge but that if it made the former choice, it would then be compelled to find that Nelson had the necessary intent unless he produced evidence to overcome the presumption. But this is attributing altogether too much legal acumen to the ordinary juror -- who had not imbibed Wigmore's Evidence with his mother's milk. . . . [The example] was so extreme that its effect could only have been to lead the jury to choose not to rely on the principle of law in this case.

Id. at 271. After then noting that, in any case, the trial court also "listed facts and circumstances" from which the jury could "inferentially" determine the defendant's intent, id. at 272, the majority held: "We thus cannot conclude that the two offending sentences, taking about thirty seconds to deliver, 'so infected the entire trial that the resulting conviction violates due process.' Cupp v. Naughten, supra, 414 U.S. at 147." 672 F.2d at 272. Similarly, in Mancuso v. Harris, 677 F.2d

206, 210-11 (2nd Cir. 1982), petition for cert. filed, Aug. 16, 1982 (No. 82-5239), where the trial court charged the mandatory presumption but also charged on intent in permissive terms, application of the Nelson-Cupp "charge as a whole" test led to a finding of no constitutional error. And, in Langone v. Smith, 682 F.2d 287, 289-90 (2nd Cir. 1982) (Oakes, C.J., dissenting from a denial of rehearing en banc),[7] this test was deemed to save an intent charge which concluded with a flat statement of the presumption, specifically directed to the defendant and immediately followed by the trial court's asking the jury, "Is that clear?"

It is the Circuit's method of applying Cupp which is irreconcilable with the standard of analysis in Sandstrom. In his dissent in petitioner's case, Judge Oakes called the Nelson-Cupp analysis "debatable." Appendix A, at 7. Presumably, this view also led him to dissent from the Circuit's denial of a rehearing in petitioner's case. Judge Oakes earlier had expressed his opinion in stronger terms in dissenting from a denial of a rehearing en banc in Langone v. Smith, supra, 682 F.2d 287. There, he stated:

> The application of Cupp v. Naughten in this fashion simply reads Sandstrom out of the United States Reports. . . .
>
> The issue should be resolved by this circuit en banc. We have been reviewing Sandstrom claims on the order of one per sitting, and the opinions of the district judges evidence considerable confusion about how to apply both Sandstrom and the majority opinion in Nelson v. Scully, which the district judges perceive to be in conflict.

---

[7] The Circuit's main opinion in the case, a summary order, is not reported.

Id. at 290.[8]

The Seventh Circuit has invoked the "charge as a whole" analysis in similar fashion, to excuse what would otherwise appear to be a Sandstrom violation. Thus, in Jacks v. Duckworth, 651 F.2d 480, 485-87 (7th Cir. 1981), it upheld the instruction "every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such an intent." In so doing, the court relied on Henderson v. Kibbe, supra, 431 U.S. at 154, one of Cupp's progeny. In contrast, the Eighth Circuit (like the dissent below and the District Court in petitioner's case) has not applied Cupp so broadly in passing on claimed Sandstrom error. Specifically, in Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981), the court acknowledged Cupp's admonition not to view a challenged

---

[8] Despite this "confusion," also evidenced by the District Court's and Judge Oakes's strict application of Sandstrom's analysis to petitioner's case, the Second Circuit has not granted en banc review of the issue. That the Circuit has found Sandstrom error in two cases neither lessens the confusion nor establishes the correctness of its broad "charge as a whole" approach. In one, Arroyo v. Jones, 685 F.2d 35 (2nd Cir. 1982), petition for cert. filed, Sept. 21, 1982 (No. 82-521), the court was constrained to find constitutional error because the offending "natural consequences" instruction was delivered solely during the supplemental charge, which resulted in a verdict of guilty a mere twenty-five minutes later. Because a "supplemental charge must be viewed in a special light," id. at 39, the Circuit carved an exception to Nelson's "charge as a whole" test. In the other case, Ramirez v. Jones, 683 F.2d 712 (2nd Cir. 1982), petition for cert. filed, Oct. 1, 1982 (No. 82-504), in which the main charge was at issue, the court was confronted with insructions virtually identical to those delivered in petitioner's case: the challenged ones included two recitations of the "natural consequences" presumption, and one "results produced" instruction; the putatively curative ones contained the permissive "right to infer" and "circumstances" language. Applying Nelson's test, the Circuit panel (Kearse and Pierce, C.J.J.; Leval, D.J.) (different from the one in petitioner's case) unanimously concluded that the challenged instructions violated due process. That the court's "charge as a whole" analysis has led to such disparate and irreconcilable results suggests that the analysis is itself unprincipled.

instruction in isolation. Id. at 130. But it went on to observe that Sandstrom noted that other instructions did not necessarily mitigate the damaging effect of a conclusive or burden-shifting presumption. Indeed, the Court of Appeals opined that

> it would seem highly probable that a burden-shifting or conclusive presumption is the type of instruction contemplated in Cupp v. Naughten as constitutional error by itself. This is not to say that there would never be a case where other instructions could "mitigate" the error, but only an unlikelihood of such a possibility.

Id. at 131. Accordingly, the court held unconstitutional a jury instruction essentially identical to the one upheld in Jacks. Id. at 128, 131. And it did so despite the trial court's also having given the permissive instruction that intent was to be "determined from all the evidence, facts and circumstances in the case." Id.

In sum, the Second Circuit's sweeping "charge as a whole" analysis conflicts both with the Eighth Circuit's analysis and with that in Sandstrom itself. To resolve the conflict, petitioner's case should be accorded this Court's full plenary review.

CONCLUSION

A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Attorney for Petitioner

SUSAN HOFKIN SALOMON
HOWARD COMET
Of Counsel
November, 1982